

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2811 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

YAKUB AHMED PATEL,SINCE DECEASED THROUGH HIS LEGAL HEIRS

Versus

AHMEDABAD MUNICIPAL CORPORATION

Appearance:

MR KB PUJARA for Petitioners

MR BP TANNA for Respondent No. 1, 2

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 31/01/97

ORAL JUDGEMENT

This petition under Article 226 of the Constitution challenges the order passed by the respondents removing the original petitioner from service. After filing of this petition, the original petitioner Yakub Ahmed Patel expired in the year 1987 and therefore, his legal heirs and representatives were permitted to be brought on record to prosecute the

petition.

2. The facts leading to filing of the present petition, briefly stated are as under:

Yakub Ahmed Patel-original petitioner (hereinafter referred to as the delinquent) joined the services of the respondent Corporation in the year 1952. On the date of the incident, i.e. on January 29, 1980, the deceased was working as a peon in the octroi department. A charge-sheet dated April 7, 1980 was served upon the delinquent initiating departmental inquiry against him in connection with the incident which took place on the night between 29th and 30th January, 1980 alleging that the delinquent was posted as an Octroi peon at Memnagar check post for discharging his duties from 10.00 p.m. till 6.00 a.m. During that period, a truck bearing registration no. GTA 4302 carrying 100 bags of Bajra entered the city limits without paying octroi. It was Assistant Commissioner (Octroi) who detected this fact during his night checking. The delinquent was, therefore, charged with negligence in discharge of his duties in not requiring the vehicle to stop at the octroi naka and not making the entry in the vehicle register and in not ensuring that the vehicle did not enter before paying octroi. The charge-sheet also called upon the delinquent to show cause as to why the petitioner should not be visited with any penalty which may include penalty of dismissal from service.

3. The delinquent submitted his reply dated April 17, 1980 submitting that at around 1.30 a.m., the truck in question had entered the city limits alongwith a number of other vehicles which were coming back from Drive-In cinema and entering the city limits. On noticing the said truck, the delinquent had blown whistle four to five times, but the truck driver did not stop the truck. The delinquent was not in a position to notice the registration number of the truck as a large number of vehicles were behind the truck. Since last show at the Drive-in cinema was over, there were a number of speeding vehicles. The delinquent further stated that the Assistant Municipal Commissioner was in his car and he had intercepted the truck and taken the statement of the truck driver who had stated that the truck was to go towards Sarkhej, but the driver entered this road by mistake. The truck was ultimately taken out of city limits and the Assistant Commissioner had recovered octroi to the tune of Rs. 25/-, but no penalty was levied or recovered in respect of the aforesaid goods.

4. A joint departmental inquiry was held

against the octroi clerk Mukesh Sheth as well as against the delinquent. The Inquiry Officer submitted his report dated June 19,1983 holding that the octroi clerk Mukesh M Sheth had admitted the charge levelled against him and that the present delinquent Yakub Ahmed Patel was found to be guilty of the charge- levelled against him on the basis of the record, including evidence and explanation of the delinquent.

5. In view of the above, the Deputy Municipal Commissioner issued second show cause notice calling upon the delinquent to show cause why a penalty of removal from the service should not be imposed upon the delinquent. The delinquent submitted his reply reiterating his earlier explanation. The Disciplinary Authority-Deputy Municipal Commissioner passed the impugned order dated September 29,1984 holding that the delinquent was guilty of the charge of dereliction of duty levelled against him and imposed penalty of removal from service with effect from October 1,1984. The delinquent thereafter preferred an appeal before the Standing Committee of the respondent Corporation. The appeal came to be dismissed by the resolution dated February 27,1985.

6. The present petition is directed against the aforesaid order of Disciplinary Authority, as confirmed in appeal. The decision of the appellate authority was not produced at the time of filing of the petition, but it has been produced before the Court subsequently at the time of hearing of this petition.

7. After the petition was admitted, the delinquent expired in the year 1987 and his legal heirs have been permitted to be brought on record to prosecute the petition, as stated above.

9. At the hearing of the petition, Mr. Pujara, learned counsel for the petitioner submitted that in view of the facts and circumstances of the case and the charge held to have been proved against the delinquent, the penalty of removal from service was excessively harsh and disproportionate and was therefore, illegal and unconstitutional. Learned advocate Mr. Pujara highlighted following aspects to show that the penalty was harsh and excessive.

- (i) The delinquent had put in 32 years of service when he came to be removed from service.
- (ii) The employee had 7 more years of service left when the impugned order came to be passed.

(iii) The charge held to have been proved against the delinquent was that of negligence and the charge did not involve even any allegation of financial impropriety or illegal gratification.

(iv) The past service record of the delinquent was not such as to warrant the death penalty of removal from service which would also take away all retiral benefits from the delinquent and his widow.

9. Mr. Pujara also relied on the judgment of the Hon'ble Supreme Court in the case of Hussaini vs. The Hon'ble the Chief Justice of High Court of Judicature of Allahabad and others, AIR 1985 SC page 75, which was a case where a Safai Jamadar was dismissed from service by the Registrar of Allahabad High Court. At the time of dismissal, he had rendered service of over 20 years, but because of the order of dismissal, he was denied retiral benefits such as provident fund, pension, gratuity to which he would have been entitled to if he had been compulsorily retired from service, even by way of punishment. After referring to the aforesaid circumstances, the Apex Court made the following observations:

" The Appellant was a low paid safai Jamadar. We do not propose to minimise the gravity of his misconduct for which the High Court thought fit to impose maximum punishment of dismissal from service simultaneously denying him all retiral benefits. Without in any manner detracting from the view taken by the High Court we are of the opinion that there is some scope for taking a little lenient view in the matter of punishment awarded to the appellant. The lenience if at all would render the post dismissal life of the low paid employee a little tolerable and keep him away from the penury and destitution.

How much is the cushion or the elbow room in the matter of punishment ? Appellant cannot be reinstated in service. He must remain out of his last employment. Therefore, the only course open to us is to convert the order of punishment into one of compulsory retirement so that while denying service to the appellant he will be ensured retiral benefits.

We accordingly allow the appeal, convert the order of dismissal into one of compulsory retirement...."

10. On the other hand, Mr. B.V.Mehta, learned counsel for the respondent Corporation opposed the petition and submitted that in exercise of its powers Article 226 of the Constitution, this Court should not interfere with the order of penalty imposed upon the

delinquent by the competent authority and confirmed in appeal. Mr. Mehta relied upon the following observations made by the Apex Court in the case of B.C.Chaturvedi vs. Union of India and others, 1995(6) SCC,749:

" A review of the above legal position would establish that the disciplinary authority, and on appeal the appellant being fact finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

11. I have heard the learned counsel for the parties. The first question which arises for consideration is whether the penalty of removal imposed upon the delinquent was grossly harsh and disproportionate. It is required to be noted that

(i) the charge levelled against the delinquent was that of negligence or at the most dereliction of duty and not of financial impropriety or demand or acceptance of any illegal gratification. The appellate authority has also noted this fact in its order.

(ii) The only charge found to have been proved against the delinquent was that the truck followed by other traffic had sped away and the delinquent, a peon in the octroi department without any vehicle, had not noted the registration number of the truck nor made any attempt to stop the truck. Ultimately the amount of octroi which was levied by the Assistant Commissioner on checking was found to be Rs. 25/-. (No penalty was levied or recovered in respect of the concerned truck.)

- (iii) The octroi clerk who was also on duty on that day had also admitted his guilt at the joint departmental inquiry.
- (iv) In the past, the delinquent was warned for negligence and on another occasion, he was fined Rs. 1/for reporting late on duty. He was suspended pending the inquiry. Even after the incident in question, the delinquent had put in four years service in the office of the Municipal Secretary, where no adverse remarks were found in his service record.
- (v) The delinquent had put in 32 years of service at the time when the penalty order was passed against him. The impugned penalty of removal from service not merely deprived him of the remaining service period of 7 years but also the retiral benefits including gratuity, pension, etc. flowing from the service rendered for 32 years.

12. Looking to the aforesaid facts and circumstances, I have no hesitation in holding that the penalty imposed upon the delinquent was shockingly harsh and disproportionate. It is doubtful whether a reasonable employer would have thrown such a person out of service. Even if the conduct of the delinquent can be considered to be such that he was not required to be continued in service, in the facts and circumstances narrated above, the order of compulsory retirement would have met the ends of justice and that would have achieved the object of keeping the delinquent out of service and at the same time, would not have deprived the delinquent of the retiral benefits accruing after 32 years of service.

13. The next question is whether the Court should simply set aside the order of removal and remand the matter back to the authorities for re-consideration of penalty or whether the court should itself substitute the order of penalty. Although, it is true that ordinarily in such cases, the court should merely set aside the order of penalty and direct the concerned authority to re-consider the question of penalty, it appears to me that in the facts and circumstances of this case, especially when the impugned order was passed in the year 1984 and the order is being set aside after 12 years and the delinquent has already expired during pendency of the petition and his widow is merely awaiting payment of the retiral benefits which would have

otherwise accrued to the delinquent upon setting aside of the order of removal, this is that exceptional and rare case where the Court should itself pass an order for substituting the penalty by an order of compulsory retirement.

14. In view of the aforesaid discussion,, the order dated September 29,1984 passed by the Deputy Municipal Commissioner (Administration) and the appellate order contained in Reolution no. 1799 dated February 27,1985 passed by the Standing Committee of the Ahmedabad Municipal Corporation are hereby set aside and the order of removal passed against late Yakub Ahmed Patel is hereby ordered to be converted into one of compulsory retirement w.e.f. October 1,1984. The respondents shall also pass necessary consequential orders regarding payment of gratuity and other retiral dues to petitioner no. 1 Aysha Yakub Patel in accordance with the Rules. The amount payable to her shall be computed within two months from the date of receipt of the writ of this Court or a certified copy of this judgment, whichever is earlier. The amount so computed alongwith interest at the rate of 6% p.a. for the period from January 1,1985 till March 31,1997 shall be paid to her on or before May 31,1997 failing which the respondents shall pay further interest at the rate of 12% p.a. w.e.f. April 1,1997 till the date of payment.

15. Rule is accordingly made absolute with costs.

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